

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-2131

NOV 5 - 1976

NEW YORK CITY OFFICE

ATTORNEY GENERAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-2131

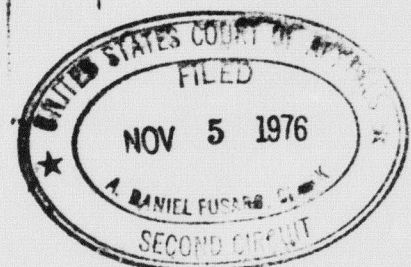
JACK CZARNETSKY, Superintendent of
Eastern Correctional Facility,

BRIEF AND APPENDICES FOR
PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK DISMISSING A PETITION FOR A
WRIT OF HABEAS CORPUS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
EDWARD FARRELL,

Petitioner-Appellant,

-against-

JACK CZARNETSKY, Superintendent of
Eastern Correctional Facility,

Respondent-Appellee.
-----x

QUESTION PRESENTED

Whether Penal Law, §160.15(4), under which petitioner was convicted, violates the Due Process Clause since the statute requires a defendant to establish by a preponderance of the evidence that the revolver displayed in a robbery was not loaded or was inoperable in order to reduce a charge of robbery in the first degree to robbery in the second degree.

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York (Hon. Charles M. Metzner), dated August 4, 1976, dismissing petitioner's application for a writ of habeas corpus [417 F. Supp. 987]. On August 23, 1976 Judge Metzner granted petitioner leave to proceed in forma pauperis with William E. Hellerstein and Barry Bassis of the Legal Aid Society as counsel. On October 5, 1976, Judge Metzner granted petitioner's application for a certificate of probable cause.

STATUTES INVOLVED

New York Penal Law, §160.15:

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

* * * *

4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

Robbery in the first degree is a class B felony.

New York Penal Law, §160.10:

A person is guilty of robbery in the second degree when he forcibly steals property and when:

. . . .

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

. . . .

(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

Robbery in the second degree is a class C felony.

STATEMENT OF FACTS

Petitioner was indicted in Bronx County on March 18, 1972, on two counts of robbery in the first degree (as well as lesser offenses) for having forcibly stolen property from Juan Rivera and Aaron Jones in two incidents in which, with the aid of another, he "displayed what appeared to be two pistols, revolvers and other firearms." The People's case rested upon the testimony of the two complainants, who were robbed by the same pair of men one half hour apart in the early morning hours of March 10, 1972. The prosecution also introduced into evidence Jones' cigarette lighter, which was taken in the robbery and was allegedly found in petitioner's possession at the time of his arrest. The revolvers used by the perpetrators had not been fired during the incident and were never recovered by the authorities. Petitioner presented an alibi defense through his own testimony and that of his brother, David Farrell.

The court instructed the jury in accordance with the language of Penal Law, §160.15,* which provides:

A person is guilty of robbery in the first degree [a B felony] when he forcibly steals property and when, in the course of the commission

*The crime of robbery in the second degree, a C felony [P.L. §160.10], contains the following elements:

A person is guilty of robbery in the second degree when he forcibly steals property and when:

.....

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

footnote cont'd.

of the crime or of immediate flight therefrom,
he or another participant in the crime:

. . . .

Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

The jury found petitioner guilty of robbery in the first degree (two counts) and possession of a weapon as a misdemeanor.* On June 4, 1974, petitioner was sentenced to concurrent terms of five to fifteen years on the robbery charges to run concurrently with a one year sentence on the weapons count.

One year after petitioner's conviction, Mullaney v. Wilbur, 421 U.S. 684 (1975), was decided by the Supreme Court. The issue of the constitutionality of the robbery statute was thereafter raised before the Appellate Division, First Department and before Associate Judge Cooke of the New York Court of Appeals. The Appellate Division reversed

Footnote cont'd.

. . . .

(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

*Under the weapons charge (count seven of the indictment), petitioner, "acting in concert with another person, in the County of Bronx, on or about March 10, 1972, carried and possessed two pistols and revolvers with intent to use the same unlawfully against another.

the conviction on the weapon count and dismissed that count of the indictment and otherwise affirmed the conviction [49 A.D.2d 836]. The court's decision, dated October 16, 1975, is attached hereto as Appendix A. A letter from petitioner's attorney to Judge Cooke, dated October 23, 1975, specifying the Mullaney issue as one meriting review by the Court of Appeals is attached as Appendix B and the certificate denying leave, dated November 28, 1975, is attached as Appendix C.

Petitioner, on May 25, 1976, filed a petition for a writ of habeas corpus [76 Civ. 2355] in the United States District Court, Southern District of New York, alleging that the robbery statute deprived him of due process of law under the Fourteenth Amendment. On August 4, 1976, Judge Metzner dismissed the petition in an opinion [417 F. Supp. 987] (attached as Appendix D) in which he concluded that the issue had been disposed of by the pre-Mullaney case of People v. Felder, 39 A.D.2d 373 (2d Dept. 1972), aff'd, 32 N.Y.2d 747, appeal dismissed for want of a substantial federal question, 414 U.S. 948 (1973), which upheld the constitutionality of the robbery statute. Judge Metzner granted a certificate of probable cause on October 5, 1976.

On October 13, 1976, Judge Frankel of the Southern District of New York, considering an identical challenge to the robbery statute, explicitly rejected the reasoning of Judge Metzner in the instant case and found that "the doctrine of Mullaney v. Wilbur, supra, is squarely

controlling, and that the device of an affirmative defense here in question is invalidated by that controlling authority." Reidout v. Henderson, 76 Civ. 3836 (slip. op. at 2). Judge Frankel granted the petition, ordering the petitioner released unless granted a new trial or a resentencing for robbery in the second degree rather than for robbery in the first degree within 60 days.

ARGUMENT

POINT I

SINCE P.L. §160.15(4), UNDER WHICH PETITIONER WAS CONVICTED, REQUIRES A DEFENDANT TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE REVOLVER DISPLAYED IN A ROBBERY WAS NOT LOADED OR WAS INOPERABLE IN ORDER TO REDUCE A ROBBERY CHARGE FROM THE FIRST TO THE SECOND DEGREE, THAT STATUTE VIOLATES THE DUE PROCESS CLAUSE.

Petitioner was convicted of two counts of robbery in the first degree for having forcibly stolen property in two incidents in which he, with the aid of another person, "displayed what appeared to be two pistols, revolvers and other firearms" [Ind. No. 1402/72]. Since Penal Law, §160.15 places the burden upon a defendant to prove that the weapon used in a robbery was not loaded or was inoperable to reduce the charge from robbery in the first degree to the second degree [P.L. §160.10], that statute violates the Due Process Clause of the Fourteenth Amendment.

In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Supreme Court held that the Maine rule requiring a defendant charged with murder to prove that he had acted in the

heat of passion on sudden provocation to reduce the homicide charge to manslaughter violated the Due Process Clause. Under Maine law there were two types of homicide, murder and manslaughter, sharing the common elements that the homicide be unlawful (i.e., not justifiable) and intentional. Once these elements were established by the prosecution beyond a reasonable doubt, malice aforethought was to be conclusively implied -- and the defendant was therefore guilty of murder -- unless he proved by a fair preponderance of the evidence that he had acted in the heat of passion on sudden provocation.* If the defendant was successful in meeting that burden, the charge was reduced from murder to manslaughter.

Looking at the operation and effect of the Maine rule, the Court found that the state considered those convicted of manslaughter "less blameworth[y]" than those convicted of murder and consequently subjected them to less severe penalties. Justice Powell, writing for the unanimous Court, concluded that "[b]y drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in [In re] Winship, [397 U.S. 358 (1970)]." Mullaney, supra at 698.

*Wilbur presented no evidence but the prosecution introduced his statements that the fatal assault had been committed in a frenzy provoked by the victim's homosexual advances.

New York's robbery statute suffers from the same deficiencies as the Maine homicide law. A person is guilty of robbery in the first and second degrees [under Penal Law, §§160.15(4) and 160.10(2)(b), respectively] "when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime displays what appears to be a pistol, revolver or other firearm."

However, the distinction between the two provisions is that in a prosecution for first degree robbery

it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious personal injury, could be discharged.

This defense is explicitly made inapplicable to robbery in the second and third degrees and any other crimes.

P.L. §160.15(4). Thus, the statute distinguishes between robbery in the first and second degrees on the basis of whether or not a revolver displayed is loaded and operable and, on this critical fact in dispute, the burden of persuasion is placed on the defendant. See Penal Law, §25.00(2).

Penal Law, §160.15(4) was, in fact, enacted for the purpose of shifting the burden of proof on the issue of whether a pistol was loaded and operable onto the defendant. Under §160.15 of the Penal Law of 1967, the People had to prove beyond a reasonable doubt that a revolver displayed

was loaded and operable to sustain a conviction for robbery in the first degree.*

The Practice Commentary to Penal Law, §160.15(4) explains the legislative background of the current robbery statute:

Being "armed with a deadly weapon" is an element of robbery in the first degree (160.15[2]), burglary in the first degree (§140.30[1]), and burglary in the second degree (§140.25[1-a]). This element will rarely, if ever, be established by the prosecution when the actor does not fire the weapon or the weapon is not immediately recovered. This is so because "deadly weapon" is defined as a "loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged" (§10.00[12]). A victim can only testify that the defendant pointed something at him that looked like a gun and, unless the defendant fired it, cannot possibly testify whether or not it was loaded.

The solution proposed by the 1969 bill was to add, as an element of first and second degree robbery and burglary, the display of "what appears to be" a gun. However, with respect to the first degree of each crime (§160.15[4], §140.30[4]), the provision affords the defendant an opportunity to fight his way out of a first degree conviction if he can prove that the gun was either unloaded or incapable of being fired.

*Under the Penal Code of 1881 [3 Laws of New York, Title IX, Chapter IV, §§228, 229 (1881)], and the Penal Law of 1909 [§§2124(1); 2126(2)], first degree robbery could be committed in one of three ways: with the aid of an accomplice, with the infliction of grievous bodily harm on the victim or with the aid of a "dangerous weapon". (In 1923, the aid of an automobile was added as a fourth category).

Unless a pistol was used in a dangerous manner (for example, as a club [see People v. Dade, 15 A.D.2d 629 (4th Dept. 1961)]), it was (by judicial interpretation) not a "dangerous weapon" unless it was operable. See People v. Gordon, 19 A.D.2d 828 (2d Dept. 1963); People v. King, 13 A.D.2d 997 (2d Dept. 1961). The People were not, however, obligated to prove that the weapon was loaded at the time of the robbery. People v. Roden, 21 N.Y.2d 810 (1968). From 1926 until 1963, Penal Law §1944 provided for an additional five to ten years' imprisonment for

footnote cont'd.

Therefore, to assist the prosecution, the legislature "in effect, created a presumption that the firearm displayed during the course of a forcible theft of property was loaded, operable and capable of causing serious physical injury." People v. Felder, supra, 39 A.D.2d at 376.

This shifting of the burden of proof denigrates petitioner's critical interests in liberty and reputation. As in the Maine murder law, there is a "potential difference in restrictions of personal liberty attendant to each conviction" [Mullaney, supra at 698], since robbery in the first degree is a class B felony, which carries a maximum sentence of as much as 25 years and a minimum of up to 8 1/3 years, while second degree robbery carries a maximum sentence

Footnote cont'd.

those committing crimes with certain enumerated weapons, including imitation pistols. See People ex rel Griffin v. Hunt, 267 N.Y. 597 (1935).

Under the Revised Penal Law of 1967 the crime of first degree robbery [Penal Law, §160.15] required the infliction of serious physical injury, the possession of a "deadly weapon" or the use of a "dangerous instrument". Unless a revolver was used in a dangerous manner, the People had to prove not only operability of the revolver, but that the weapon was loaded as well.

Thus, mere proof that a pistol was displayed during the incident only made out the crime of robbery in the second degree. People v. Iglesias, 40 A.D.2d 778 (1st Dept. 1972). At the same time, presence of an accomplice was reduced to robbery in the second degree.

In 1969, the robbery statute [Penal Law §§160.15; 160.10] was amended to shift the burden of proof to the defendant on the critical elements of whether the weapon displayed during the crime was loaded and operable.

of up to 15 years and a minimum of up to 5 years.* In a desperate attempt to avoid the mandate of Mullaney, supra, respondent argued below that this disparity is not "large enough to require the prosecution to prove that the gun was loaded and operable." This argument overlooks the fact that, as with the Maine statute, the interests found critical in Winship are "implicated to a greater degree in this case than they were in Winship itself." Winship faced an 18-month sentence with a maximum possible extension of four and one-half years [Mullaney, supra at 700] while petitioner faced a possible ten more years of imprisonment because of his conviction of the higher offense. A defendant can be convicted of the more serious crime of robbery in the first degree and receive a 25 year sentence when it is as likely as not that he deserves a significantly lesser sentence. Moreover, in determining whether due process requirements apply in the first place, this Court "must look not to the 'weight' but to the nature of the interest at stake. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925, 928 (2d Cir. 1974), vacated sub nom. Regan v. Johnson, 419 U.S. 1015 (1974). Thus, like the Maine homicide law, New York's robbery statute violates the due process requirement that the

*Appellant's sentence of 5 to 15 years would therefore have been the maximum permissible for second degree robbery but was in about the middle of the range of sentencing for robbery in the first degree.

People prove every element of the crime beyond a reasonable doubt. As the Court made clear in Mullaney (supra at 701-02), the difficulties involved in establishing the critical fact in dispute do not justify placing the burden upon the defendant. This holds true even for elements such as intent "which are peculiarly within the knowledge of the defendant" [id. at 702].*

The court below also erred in its conclusion that the Supreme Court's dismissal of the appeal in People v. Felder, supra, for want of a substantial federal question was dispositive of the issue in the instant case. As Judge Frankel found, Mullaney v. Wilbur, supra is "squarely controlling" upon the instant case. Mullaney is an important doctrinal development which treated the issue on the merits, thereby overriding the "somewhat opaque" [Gibson v. Berryhill, 411 U.S. 564, 576 (1972)] precedent of Felder. See Hicks v. Miranda, 422 U.S. 332, 344-45; Mercado v. Rockefeller, 502 F.2d 666 (2d Cir. 1974).**

*Respondent argued below that Mullaney is not retroactive. Since Mullaney is based upon the Supreme Court's earlier decision in In re Winship, 397 U.S. 358 (1969), which was given retroactive effect in Ivan v. City of New York, 407 U.S. 203 (1972), it follows that Mullaney should likewise be given retroactive effect. People v. Patterson, 39 N.Y.2d 288, 296 (1976); People v. Davis, 49 A.D.2d 437, 443-44 (4th Dept. 1975); see United States v. Regan, 525 F.2d 1157, 1160 n. 3 (3d Cir. 1975). Therefore, petitioner may assert a Mullaney claim though his conviction antedated the Supreme Court decision.

**Respondent incorrectly stated in his brief below that Felder involved "[a] claim identical to petitioner's." An analysis of that case reveals that the challenge to the robbery statute therein was not grounded upon the due process claim as to whether the State may shift to the defendant the burden of disproving an element of the crime but upon the privilege against self-incrimination. See People v. White, 86 Misc.2d 803 (Sup. Ct. N.Y. Co. 1976).

Following the command of the Supreme Court to "deal with 'substance rather than ... formalism'", Judge Frankel concluded that the New York robbery statute denigrated the "interests found critical in Winship" by transferring a "weighty burden of proof to the defendant...." Reidout v. Henderson, supra (slip. op. at 2). The statute not only places the potential of greater punishment upon those who commit robberies with weapons that are loaded and operable but, like the Maine murder rule, requires the defendant to prove by a preponderance of the evidence the critical fact distinguishing the crimes of robbery in the first and second degree. Rather than affording the defendant an opportunity "to fight his way out of a first degree conviction" [Practice Commentary to Penal Law, §160.15(4)], the Due Process Clause requires that the State "fight" him into the more serious offense by proving all the elements of that crime beyond a reasonable doubt.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE GRANTED AND PETITIONER ORDERED RELEASED FROM CUSTODY UNLESS A NEW TRIAL IS CONDUCTED OR, ALTERNATIVELY, UNLESS PETITIONER IS RESENTENCED FOR ROBBERY IN THE SECOND DEGREE WITHIN SIXTY DAYS.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
WILLIAM J. GALLAGHER
Attorney for Petitioner-
Appellant

BARRY BASSIS
Of Counsel
November, 1976

APPENDIX A

DECISION OF THE APPELLATE DIVISION,
FIRST DEPARTMENT, DATED OCTOBER 16,
1975, AFFIRMING THE CONVICTION, BUT
REVERSING THE CONVICTION FOR POSSESSION
OF A WEAPON

OCT 17 1975

At a term of the Appellate Division of the Supreme Court
held in and for the First Judicial Department in the County of
New York, on October 10, 1975.

Present—Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
George Tilsner,
Louis J. Capompoli,
Nyles J. Lane, Justices.

The People of the State of New York,

Respondent,

1079

-against-

Edward Farrell,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant

from a judgment of the Supreme Court, Bronx County

(Dronan, J.), rendered entered on June 4, 1974, convicting defendant,
after a jury trial, of the crimes of robbery in the first degree
(two counts) and possession of a weapon as a misdemeanor,

and said appeal having been argued by Mr. Barry Bassis

of counsel for the appellant, and by Mr. Robert J. Hume, III

of counsel for the respondent; and due deliberation having been had thereon, and upon the
memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment

so appealed from be and the same is hereby modified, on the law, to the extent of
reversing the conviction on the weapon count and dismissing that
count of the indictment and, as so modified, the judgment is affirmed.

ENTER:

HYMAN W. GAMSQ

Clerk.

Kupferman, J.P., Lupiano, Tilzer, Capozzoli, Lane, JJ.

1079 The People of the State of New York,
Respondent,

R.J.Hume , III

-against-

Edward Farrell,
Defendant-Appellant.

B. Bassis

Judgment, Supreme Court, Bronx County (Drohan, J.), rendered June 4, 1974, convicting defendant, upon a jury verdict, of two counts of robbery in the first degree and possession of a weapon as a misdemeanor, unanimously modified, on the law, to the extent of reversing the conviction on the weapon count and dismissing that count of the indictment and, as so modified, the judgment is affirmed.

Scrutiny of the record warrants concluding that the count of possession of a weapon as a misdemeanor was a lesser included concurrent count to robbery in the first degree. The remaining contentions advanced by defendant have been examined and found to be without merit.

Order filed.

APPENDIX B

LETTER TO JUDGE COOKE, DATED OCTOBER
23, 1975, SPECIFYING THE MULLANEY
ISSUE AS ONE MERITING REVIEW BY THE
COURT OF APPEALS.

October 23, 1975

Hon. Lawrence H. Cooke
Judge of the Court of Appeals
Court House
Monticello, New York

Re: People v. Edward Farrell

Your Honor:

I am writing in reference to our application for leave in the aforementioned case. The issues upon which we seek leave are contained in Points I and II of appellant's brief in the Appellate Division. The prosecutor's misconduct at trial and the constitutionality of Penal Law §160.15(4) in light of Mullaney v. Wilbur.

The district attorney's misconduct extended throughout the trial and was the cause of innumerable objections and several mistrial motions by defense counsel. The court also threatened the prosecutor with a mistrial and reprimanded him frequently. In their brief below, the People concede Trowbridge errors, improper reference to appellant's failure to call his mother-in-law as a witness, improper rebuttal testimony by two police witnesses and an improper statement by the prosecutor as an unsworn witness. As can be seen from our brief, these errors were only a few of the highlights of the district attorney's performance. The prosecutor engaged in bad faith cross-examination, sought to show appellant's propensity to commit crimes in taxi cabs and made sarcastic remarks. He additionally argued that defense counsel's questioning of the People's witnesses indicated a disbelief

Hon. Lawrence H. Cooke

October 23, 1975

in appellant's alibi, thus encumbering the constitutionally protected right of cross-examination.

The second issue raised on this appeal is the constitutionality of the robbery statute in light of the Supreme Court's decision in Mullaney v. Wilbur. Penal Law §160.15(4) requires a defendant to prove by a preponderance of the evidence that the weapon used in a robbery was not loaded or was inoperable to reduce the charge from robbery in the first degree to the second degree. As the Mullaney decision makes clear, the Due Process Clause mandates that the prosecution bear the burden of proving this critical fact beyond a reasonable doubt.

Two substantial issues, both properly preserved, are presented on this appeal. Each merits consideration by the Court of Appeals.

Respectfully yours,

Barry Bassis

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APPENDIX C

CERTIFICATE DENYING LEAVE TO TAKE
THE CASE TO THE COURT OF APPEALS,
SIGNED BY JUDGE COOKE ON NOVEMBER
28, 1975.

State of New York

Court of Appeals

BEFORE: HON. LAWRENCE H. COOKE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
against

CERTIFICATE
DENYING
LEAVE

Edward Farrell,
Appellant.

I, LAWRENCE H. COOKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Monticello, New York
November 28, 1975

Lawrence H. Cooke,
Associate Judge

*Description of Order: Order of the Appellate Division, First Department, modifying; on the law, the judgment of the Supreme Court, Bronx County rendered June 4, 1974, convicting defendant of the crimes of robbery in the first degree (two counts) and possession of a weapon as a misdemeanor, to the extent of reversing the conviction on the weapon count and dismissing that count of the indictment and, as so modified, affirmed.

APPENDIX D

JUDGE METZNER'S MEMORANDUM DISMISSING
HABEAS CORPUS PETITION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
EDWARD FARRELL, :

Petitioner, :

-against- :

76 Civ. 2355
(CMM)

JACK CZARNETSKY, Superintendent of :
Eastern Correctional Facility, :

Respondent. :
----- X

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METZNER, D. J.:

In this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, petitioner alleges that his confinement at the Eastern Correctional Facility upon conviction of first degree robbery is in violation of the due process clause of the Fourteenth Amendment under the holding of Mullaney v. Wilbur, 421 U.S. 684 (1975).

Petitioner was convicted of two counts of robbery in the first degree and of possession of a weapon on June 4, 1974. On October 16, 1975, the Appellate Division of the First Department reversed the conviction on the weapon count and affirmed the judgment as modified. Leave to appeal to the Court of Appeals was denied on November 28, 1975. Petitioner has exhausted his state remedies as required by 28 U.S.C. § 2254(b) and (c), since he raised his claim under Mullaney, supra, in the state courts.

Section 160.15 of the New York Penal Law under which petitioner was convicted provides:

"A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

* * *

4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under

this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime."

Petitioner contends that since Section 160.15(4) placed the burden on him to prove that the weapon used in the robberies was not loaded or inoperable in order to reduce the charge from first to second degree robbery, that statute violates the due process clause of the Fourteenth Amendment.

The constitutionality of Section 160.15(4) of the New York Penal Law was upheld in People v. Felder, 39 App. Div. 2d 373, 334 N.Y.S.2d 992 (2d Dept. 1972), aff'd, 32 N.Y.2d 747, 297 N.E.2d 522, 344 N.Y.S.2d 643, appeal dismissed for want of a substantial federal question, 414 U.S. 948 (1973). Felder has not been overruled by Mullaney.

In Mullaney the Supreme Court reversed a murder conviction because the Maine law required the defendant to establish that he acted in the heat of passion upon sudden provocation in order to reduce the charge of murder to manslaughter. An essential element of the crime of murder,

malice aforethought, was presumed upon proof that a homicide was intentional and unlawful. The effect of this presumption, and of the requirement that the defendant disprove the element of malice aforethought, was interpreted by the Court to relieve the prosecution of its burden to prove all the elements of the crime of murder beyond a reasonable doubt in violation of the due process clause of the Fourteenth Amendment as interpreted in In re Winship, 397 U.S. 358 (1970).

In Mullaney the Court held that a presumption which relieved the state of proving what had historically been an essential element of the crime of murder violated due process. The Court did not strike down all presumptions and affirmative defenses which operate to shift the burden of proof in a criminal trial to the defendant. See Mullaney, supra at 702 n.31. Its holding is inapplicable to the affirmative defense provided in Section 160.15(4) of the New York Penal Law, as has recently been held by a New York court which considered a challenge identical to the instant claim. See People v. Archie, 85 Misc. 2d 243, 380 N.Y.S.2d 555 (Sup. Ct. 1976).

Section 160.15 requires that the prosecution prove beyond a reasonable doubt that the defendant forcibly took property by the display of what appears to be a firearm. The fact that the firearm is loaded is not

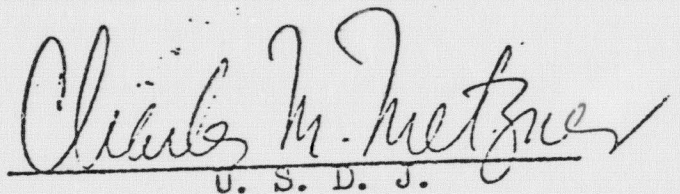
an essential element of the crime of robbery and the prosecution is not relieved of any of its burden of proof.

The affirmative defense is an ameliorative device which permits the defendant to show, after his guilt has been proved, that he was unable to complete the assault he threatened with the firearm. Due process is not offended by requiring the defendant to prove, after the prosecutor has first established the display of a firearm, that the firearm was not loaded. If he does not, the jury is entitled to presume what the criminal's victim presumes, that is, that the gun is loaded.

This petition is dismissed.

So ordered.

Dated: New York, N. Y.
August 4, 1976


U. S. D. J.

